

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ALLEN LISKE,

Defendant-Appellant.

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UNPUBLISHED

November 15, 2002

No. 236091

Macomb Circuit Court

LC No. 00-002446-FC

Before: Owens, P.J., and Talbot and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count each of first-degree criminal sexual conduct, MCL 750.520b(1)(a); second-degree criminal sexual conduct, MCL 750.520c(1)(a); and attempted second-degree criminal sexual conduct, MCL 750.520c(1)(a), MCL 750.92.<sup>1</sup> He was sentenced to concurrent terms of 120 to 480 months' imprisonment, five to fifteen years' imprisonment, and forty to sixty months' imprisonment, respectively. He appeals as of right. We affirm.

Defendant contends that the trial court abused its discretion in allowing the prosecutor to introduce evidence of other bad acts. Generally, we review a trial court's decision to admit evidence for an abuse of discretion. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). An abuse of discretion will be found only where "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *Id.*

We have held that bad acts evidence is admissible if: (i) it is offered for a proper purpose, MRE 404(b); (ii) it is relevant, MRE 402; and (iii) its probative value is not substantially outweighed by unfair prejudice, MRE 403. *People v Ortiz*, 249 Mich App 297, 304; 642 NW2d 417 (2002), quoting *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1983). MRE 404(b)(1) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be

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<sup>1</sup> All three convictions were based on defendant's conduct with a person under the age of thirteen.

admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Thus, evidence of other acts may be admissible to establish a scheme, plan, or absence of mistake.

Here, the prosecutor filed a notice of intent seeking to introduce prior bad acts evidence. Specifically, the prosecutor wanted to introduce evidence that the defendant pleaded guilty to criminal sexual conduct in St. Clair County involving the same victim. The prosecutor also wanted to introduce evidence that defendant improperly touched one of the victim's friends.<sup>2</sup> The prosecutor noted that the acts involved girls of the same age and waiting until everyone except the victim was asleep. The prosecutor also noted that the acts began with defendant "rubbing their lower stomach area, their thighs and finally inside their panties." Thus, the prosecutor contended that the other bad acts showed the victim's absence of mistake regarding her perception of defendant's conduct, as well as defendant's scheme, plan, or method.

The trial court found that the evidence was admissible for a proper purpose (plan, scheme, method, and absence of mistake) and relevant. The trial court also found that, although the evidence was prejudicial, it was not "unfairly prejudicial." Thus, the trial court allowed the prosecutor to introduce the evidence.

On appeal, defendant contends that the trial court abused its discretion in admitting the evidence because it was substantially more prejudicial than probative.<sup>3</sup> We disagree. To be sure, the evidence was undoubtedly prejudicial to defendant's case. However, although the alleged touching of the victim's friend did not lead to criminal charges, the evidence certainly supported the prosecutor's theory that defendant used a similar plan or scheme to sexually assault young girls. Moreover, the extra-jurisdictional evidence involving the victim suggested that the severity of defendant's conduct escalated over time. Thus, the evidence supported the victim's testimony that the Macomb County incidents also escalated over time. In other words, the bad acts evidence was highly relevant to weighing the victim's credibility, thereby refuting defendant's implicit theory that she fabricated the allegations. Accordingly, we are not persuaded that the evidence was *substantially* more prejudicial than probative. *Ortiz, supra* at 304. Consequently, the trial court did not abuse its discretion in allowing the prosecutor to introduce the evidence. *Snider, supra* at 419.

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<sup>2</sup> During the hearing on the prosecutor's motion, the prosecutor also requested the admissibility of evidence that defendant pleaded guilty to fourth degree CSC involving his nine-year old daughter. The prosecutor argued that the same scheme was used for all the acts. Defendant does not specifically challenge the admissibility of this evidence on appeal.

<sup>3</sup> On appeal, defendant concedes that the prosecutor's rationale for introducing the evidence satisfied a proper purpose. Defendant does not challenge the relevancy of the evidence.

Defendant also contends that he was denied a fair trial because the prosecutor argued that defendant failed to introduce exculpatory evidence. Defendant promptly moved for a mistrial after closing arguments and jury instructions. The trial court denied defendant's motion, finding that the prosecutor merely commented on the evidence without stating that defendant had an obligation to testify or produce evidence. The trial court also noted that a mistrial is appropriate only in the most extreme circumstances and that it properly instructed the jury regarding the burden of proof and defendant's right to not testify.

Generally, we review "claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Where, as here, the prosecutorial misconduct issue is preserved, we evaluate "the challenged conduct in context to determine if the defendant was denied a fair and impartial trial." *Id.* We review a trial court's decision denying a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.*, quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Here, the prosecutor's argument stopped short of commenting on defendant's failure to either testify or produce exculpatory evidence. Instead, the prosecutor's argument merely commented that the evidence did not support defendant's implicit theory that the victim's testimony was fabricated, perhaps out of revenge. In *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998), we recognized that "although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument with regard to the inferences created does not shift the burden of proof." Thus, we are not persuaded that the prosecutor's commentary was sufficient to shift the burden of proof. Further, the trial court properly instructed the jury that defendant was not required to prove his innocence, that defendant had the "absolute right" not to testify, that defendant's decision not to testify "must not affect your verdict in any way," and that it was the prosecutor's burden to establish each of the elements beyond a reasonable doubt. Consequently, we reject defendant's contention that prosecutorial misconduct deprived him of a fair trial. *Aldrich*, *supra* at 110; *Griffin*, *supra* at 36.

Affirmed.

/s/ Donald S. Owens  
/s/ Michael J. Talbot  
/s/ Patrick M. Meter